UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-78-202

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| LILLIAN R. LEWIS, Plaintiff, | ) | |
| vs. | ) | Filed November 30, 1981 |
| CENTRAL PIEDMONT COMMUNITY COLLEGE, Defendant. | ) | |

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This action was tried by the court without a jury[1] on August 26 and 27,

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[1] The defendant's answer asked for a jury trial. The case was, however, placed on the non-jury roster and was calendared for trial several times on the non-jury calendar. Several days prior to trial, defendant's counsel called to the court's attention the fact that defendant has requested a jury trial. The plaintiff sought only equitable relief, and there is therefore no entitlement to a jury trial. The fact that plaintiff sought monetary relief in the form of back pay does not transform

the claim into a legal claim. Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971), cert. dism, 404 U.S. 1006 (1971); Smith v. Hampton Training School for Nurses, 360 F.2d 577, 581 (4th Cir. 1966); Burt v. Board of Trustees of Edgefield County School District, 521 F.2d 1201, 1205 (4th Cir. 1975).

1981. The court heard final arguments on September 23, 1981. Based on all the testimony, the exhibits and the arguments of counsel, the court makes the following findings and conclusions, in compliance with Rule 52(a), F.R.Civ.P.

FINDINGS OF FACT

1. Plaintiff Lillian Lewis is black. She graduated from Johnson C. Smith University in 1964 with a bachelor's degree in economics. She was employed by defendant Central Piedmont Community College in 1966. She has been continually employed by the college since that time.

2. During plaintiff's tenure with the college, she has worked in the Business Office. When she first began work there, the Business Office was small. Its size and range of functions

have expanded considerably, as has the college itself, during the years since 1966.

3. Plaintiff was classified as cashier or head cashier from 1966 until she was promoted in December 1978 to DICER Accounting Specialist. (DICER is an acronym for Direct Index of Cost Efficiency Reporting.) As the Business Office expanded, plaintiff's responsibilities and duties likewise expanded. Although plaintiff was not working as an accountant during those years, her duties included a wide range of accounting-related functions, such as posting receipts and adjustments to accounts receivable ledger cards, balancing accounts receivable ledger cards, preparing daily cash analysis summary sheets, writing adjustment sheets for bad checks to be used for

general ledger journal entries and auditing and controlling state receipt books. They did not include reconciling or closing general ledgers.

4. During the years that plaintiff had worked in the Business Office, the defendant had several times brought in white employees with less qualifications than plaintiff to act as her supervisor. These positions were never advertised, and plaintiff did not know about them until after they were filled. In 1968 a white person was brought in as head cashier. When that person left in 1970, another white person was brought in as Cash Receipts Administrator. Plaintiff had to train both of these white employees.

5. On September 2, 1975, plaintiff applied for a position at the college as

accounting lab instructor. The position involved working with basic accounting students, as they completed problem sets assigned by their classroom instructors. The evidence did not establish that the lab instructor either wrote or graded these problem sets. He or she was expected only to supervise and assist students in the lab, rather than to teach, or to work the problems for them. Lab work was not required for students enrolled in courses other than basic courses, and students enrolled in courses other than basic courses rarely used the lab. When advanced students did use it, it was more often for the purpose of locating reference materials than for purposes of working accounting problems.

6. Plaintiff was interviewed for the position by Herb Burns, who was

chairman of the Accounting Department. During the interview, Burns asked plaintiff if she would be willing to take some refresher courses in accounting, since she had not taken any such courses since graduating from college in 1964, and her job at Central Piedmont had not given her the opportunity to apply her full educational background in accounting on a daily basis. Plaintiff agreed to do this, and Burns was satisfied that this would be satisfactory. Burns did not at any point suggest that plaintiff's academic qualifications would be a hindrance to her getting the job.

7. Burns recommended plaintiff for the position over a number of other applicants, including the white applicant who was eventually placed in

the position. This recommendation was made in a written memorandum from Burns to his supervisors; the memorandum has disappeared; the college has offered no explanation for its disappearance. Before plaintiff was officially notified, Burns' recommendation of plaintiff was for some reason either withdrawn or overruled. The college has never offered any explanation of why the department head's recommendation was overruled. Ordinarily, hiring recommendations of department heads were routinely approved without review.

8. After selection of plaintiff was apparently vetoed, Burns recommended another applicant, Emily Roberts. Roberts, who is white, was at that time a full-time student in the college's associate's degree program. She had graduated from high school just fifteen

months earlier. Roberts had no practical work experience in the area of accounting. She had, during her enrollment at the college, worked part time as a clerk-typist and had substituted as the "night" lab instructor in the accounting lab on occasion. At the time that she applied in August 1975 she had not yet completed the college's associate's degree program. She received her associate's degree in September, 1975.

9. The college's personnel policy at that time gave a preference to incumbent employees of the college in that they were given the first opportunity to apply for job openings. Vacancies were advertised first in The Communicator, an internal house newspaper which is distributed to full

time college employees. By first advertising internally, the college could promote from within, if there was a qualified applicant within the college. Plaintiff, as a long-standing full-time employee, was entitled to this preference. Roberts' status as a student typist did not qualify her for the preference for promoting present college employees.

10. When Roberts was chosen over plaintiff, a question was raised about why Roberts was selected. The college's personnel officer required Burns' supervisor to explain the selection. The supervisor, Dr. Travis, wrote a memorandum giving three reasons for selecting Roberts over plaintiff. The personnel director rejected two of the three reasons as not being appropriate reasons on which to base a personnel

selection. Travis then re-wrote the memorandum and omitted the offending explanation, in order to conform to the personnel director's expectations.

11. This procedure, of requiring a justification of the personnel selection, was an unusual practice, and was not customarily followed in filling a vacancy.

12. Plaintiff was fully qualified for the position of accounting lab instructor, and in fact was better qualified than Roberts to work with students in the accounting lab, because of her extensive experience using accounting principles in a practical work setting. Unlike Roberts, she was qualified to assist and counsel students who planned to use their education in the business world. The evidence showed

that plaintiff over a period of a number of years before 1975 had been a mainstay in the operation of the Business Office, that she had demonstrated a great deal of ability to work with the college's financial books and records, and that she had the ability to work in a sophisticated accounting job (DICER) when finally given the opportunity. She had consistently done a good job for the college and accepted the growing responsibilities of the Business Office which accompanied the growth of the college itself.

13. The defendant sought to justify the selection of Roberts on the sole basis of her academic record. There is no evidence which would support a finding that academic background was the only qualification relevant to the job. 'On the contrary, Burns' initial

recommendation of plaintiff, with the understanding that she take refresher courses following her selection, demonstrates that academic qualifications were not the controlling factor in determining who was best qualified. In addition, there was evidence that the college had previously hired lab instructors in other departments who did not have the full academic training of college. Lab courses are designed to allow students to learn the practical aspects of their particular discipline, and plaintiff's years of experience with the college would appear to make her best qualified for this position.

14. The subsequent effort, in the form of the Travis memoranda, to justify the selection of Roberts is pretextual,

and the court does not credit it. Travis failed to mention or explain the initial recommendation of plaintiff, and rewrote his original justification memorandum to satisfy the personnel officer. Further, the memoranda were prepared after the fact, for the purpose of justifying a questioned personnel selection, and their credibility is for this additional reason suspect. Indeed, the very fact that plaintiff was initially recommended over Roberts is itself evidence that the memoranda's justifications are pretext, and Lewis was originally determined to be the best qualified candidate for the accounting lab position.

15. In October 1976 plaintiff applied for a position as Senior Accountant in the defendant's Business Office.

16. Robert Hoelzel, who was and is the college's Controller, and who was at that time in charge of the Business Office, became aware in August 1976 that the person in the position would be leaving because of his inability to perform the job.

17. College procedures required that the vacancy be advertised in The Communicator prior to its being advertised in any media outside the college. Hoelzel had been informed of this policy by the personnel office, and should have been aware of it during the process of filling this vacancy. Hoelzel was also informed that college policy required that any media advertising be placed by the personnel office, and not by the department where the vacancy occurred.

18. Notwithstanding his knowledge of the college policy, Hoelzel advertised the position in the Charlotte Observer, a daily newspaper of general circulation. The ads ran on September 17, 18 and 19, 1976. These advertisements were placed directly by Hoelzel, without consulting or notifying the personnel office. He also interviewed the applicants and hired Kathern Davis, a white applicant, for the position, without notifying or consulting the personnel office, in violation of college policy.

19. Hoelzel eventually notified the personnel office of the vacancy, and it was advertised in The Communicator on Friday, October 1, 1976. Plaintiff applied for the position the following Monday, October 4, 1976. On that same day, Ms. Davis reported for her first

day on the job. Ms. Lewis was, of course, never considered for the position, because it had already been awarded to Davis.

20. When plaintiff learned that the position had been filled, she questioned Betty Funderburke, the personnel officer, about this. Funderburke called it to the attention of the president of the college. Only after he was directed to do so by the president did Hoelzel speak with the plaintiff about it. He apologized to her, but he gave her no reason, either then or at trial, to explain his deviation from known policies of the college, except to say that he had made a mistake.

21. There was never a comparison of plaintiff's qualifications with the

successful white applicant, since the position had already been filled when plaintiff submitted her application. Under the college's policy, plaintiff and Davis would not necessarily have been compared, since the college's policy provided that a promotion could be given to a qualified incumbent, before applicants from outside the college were solicited. However, the court finds that Davis' qualifications were superior to plaintiff's and that there was no discrimination in the filling of this vacancy. 2/

22. In December 1978 plaintiff applied for and was selected for the

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2/ It is worth noting that Hoelzel was looking for an applicant with experience in fund accounting and with computer experience and that Davis had neither. Davis had studied both subjects, but had never worked in the accounting field. Her 26 quarter hours of accounting translated into slightly more than 17 semester hours. Plaintiff had 12 semester hours of accounting courses.

DICER Accounting Specialist position. In that position, she has performed a number of specialized and sophisticated accounting duties. Her performance in that position demonstrates that she could have handled the professional demands of both positions she had earlier been denied.

23. The difference between plaintiff's earnings and those of Emily Roberts were, for the years shown:

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| 1975 | $144.00 |
| 1976 | 690.00 |
| 1977 | 816.00 |
| 1978 | 708.00 |

28. Since plaintiff received the DICER job in December 1978, her salary has been greater than that of the lab instructor position. Consequently, her entitled to back payment terminates at

that point.

CONCLUSIONS OF LAW

The applicable standards to be applied in Title VII cases were set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 49 L.W. 4214 (1981). The claim relating to the accounting lab is brought under 42 U.S.C. § 1981 rather than Title VII. Although the Fourth Circuit has left open the question whether proof of racial motivation is required under 42 U.S.C. § 1981, United Black Firefighters of Norfolk v. Hirst, 604 F.2d 844, 848 (4th Cir. 1979), claims of disparate treatment have long required some showing of intent when brought under Title VII. See International Brotherhood Of Teamsters v. United States, et al., 431 U.S. 324, 335 n.15 (1976). The

sequence of proof in a Title VII claim remains applicable to claims of employment discrimination brought under § 1981. See Sabol v. Snyder, 524 F.2d 1009, 1012 (10th Cir. 1975); Ingram v. Madison Square Garden Center, Inc. 482 F.Supp. 918, 924 (S.D. N.Y. 1979). See also Johnson v. Ryder Truck Lines, Inc., 575 F.2d 471, 475 (4th Cir. 1978), cert. den., 440 U.S. 979.

Under McDonnell Douglas and Burdine, plaintiff must first establish a prima facie case of discrimination. She can do this by showing: (1) that she is a member of a racial minority; (2) that the defendant was seeking applicants for a vacancy; (3) that she was qualified for the position; and (4) that she applied for the job and was not accepted. The court holds that

plaintiff met her initial burden of establishing a prima facie case with respect to both the accounting lab and the senior accounting positions.

Under Burdine, plaintiff is entitled to judgment a a matter of law if the defendant then fails to articulate a legitimate non-discriminatory explanation of its action.

> If the trier of fact believes the plaintiff's evidence [establishing a prima facie case], and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Burdine, 49 L.W. at 4216. If the defendant articulates such a legitimate, non-discriminatory explanation for its action, the plaintiff then has the opportunity to persuade the court that the articulated reason is pretextual.

Defendant attempted to explain the withdrawal of the initial recommendation of Ms. Lewis and the selection of Ms. Roberts, a white applicant, for the lab instructor position on the basis of Ms. Roberts' alleged superior qualifications. The court has weighed the evidence, and concludes that this explanation is pretextual. Among the factor which the court has considered in making this determination are plaintiff's superior qualifications for the position, when her non-academic as well as academic background is considered; the defendant's past history of denying plaintiff promotions by awarding them to less qualified whites; the fact that the explanation tendered by the college was prepared only after the fact, in response to a request to explain the selection; the fact that

Travis was willing to tailor his response to whatever the personnel officer felt was appropriate; the fact that plaintiff had been previously recommended as the best qualified applicant; and the fact that no reason has ever been advanced as to why the initial recommendation did not stand. The court further finds in the evidence taken as a whole -- the unexplained withdrawal of the initial recommendation of plaintiff for the job, and the post hoc explanations for the substitution of an inexperienced white applicant -- a strong suggestion that racial motivation played a part in defendant's actions.

With respect to the senior accountant position, the defendant's only explanation for its failure to follow its own personnel policies was

that Hoelzel, for some unexplained reason, "goofed." The court does not consider this to be a "legitimate, non-discriminatory" explanation for its action. Nonetheless, the court holds that the successful white applicant was better qualified than was plaintiff, and that plaintiff did not carry her burden of proving that defendant's articulated reason for its final hiring decision was pretext. See Burdine, supra, 49 L.W. at 4217.

In order to make her whole for the denial of the accounting lab position, plaintiff is entitled to recover back pay. That amount is calculated as the difference between the amount she was able, with reasonable effort, to earn, and what she would have earned, had she been employed in the position. Inasmuch as plaintiff was subsequently promoted

to a more desirable position and seeks no promotion in connection with the accounting lab position, no further specific relief is required.

Plaintiff is also entitled to recover pre-judgment interest on the back pay award. Goodwin v. City of Pittsburgh, 480 F.Supp. 627, 635 (W.D. Pa. 1979), aff'd. 624 F.2d 1090 (3rd Cir. 1980); Vant Hul v. City of Dell Rapids, 465 F.Supp. 1231, 1233 (D.S.D. 1979); Howard v. Ward County, 418 F.Supp. 494, 506 (D.N.D. 1976); EEOC v. Local 2P, Lithographers and Photoengravers International Union, 412 F.Supp. 530, 543 (D. Md. 1976); Chastang v. Flynn & Emrich Co., 381 F.Supp. 1348, 1351-2 (D. Md. 1974), aff'd. 541 F.2d 1040 (4th Cir. 1976). The amount of back pay provided in the

judgment will include pre-judgment interest computed at the rate of eight per cent. N.C.G.S. § 24-1. Interest at eight per cent through October 31, 1981, is $970.00.

Plaintiff is the prevailing party in this litigation and is entitled to recover her attorney fees. 42 U.S.C. § 1988. As such, she is entitled to recover for "all time reasonably expended on a matter." S.Rep. 94-1011, 94th Cong., 2nd Session, at p. 6, expressing the Congressional intent as to the interpretation of 42 U.S.C. § 1988. In Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624, 636 (6th Cir. 1979), the Court said:

> This approach [of cutting compensable hours for issues not prevailed upon] is not proper under the Fees Awards Act (42 U.S.C. § 1988). The question as to whether

> the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues or research which was ultimately unproductive, rejected by the court or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole, the district courts are to allow compensation for hours expended in unsuccessful research or litigation, unless the positions are frivolous or in bad faith.

See also Stanford Daily v. Zurcher, 64 F.R.D. 680, 684 (N.D. Calif. 1974), aff.d, 550 F.2d 464 (9th Cir. 1977); rev'd. on other grounds, 436 U.S. 547 (1978); Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981); Skerkow v. State of Wisconsin, Department of Public Instruction, 630 F.2d 498, 504 (7th Cir. 1980). A separate order will be entered dealing with fees and costs.

This 25 day of November, 1981.

/s/ James B. McMillan
James B. McMillan
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 82-1079

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Lillian R. Lewis,

Appellee,

v.

Central Piedmont Community College,

Appellant.

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Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge

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Argued: July 21, 1982
Decided: October 4, 1982

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Before RUSSELL, WIDENER and HALL, Circuit Judges.

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William L. Auten (Blakeney, Alexander & Machen on brief) for Appellant; Louis L. Lesesne, Jr. (Gillespie & Lesesne; Jonathan Wallas, Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A. on brief) for Appellee.

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HALL, Circuit Judge:

Lillian R. Lewis filed this suit pursuant to the Civil Rights Act of 1886, 42 U.S.C. § 1981, and Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(f), alleging that the defendant, Central Piedmont Community College (the College), discriminated against her on the basis of race when it failed to promote or transfer her to several positions for which she applied. The district court, after a trial without a jury, found for the plaintiff with regard to one of the alleged incidents of discrimination and ordered the payment of $2,358.00 in back pay. Additionally, the court awarded plaintiff's counsel $9,964.64 in attorney's fees and costs pursuant to 42 U.S.C. § 1988. From those orders, the defendant appeals. We reverse.

I.

Lillian Lewis, who is black, graduated from Johnson C. Smith University with a bachelor's degree in economics in 1964. Her curriculum there included two courses in accounting principles and two in intermediate accounting. Subsequent to her graduation, she worked as a key punch operator and, in 1966, began working as a cashier in the business office at the defendant College.

In September, 1975, Lewis applied for a position as an accounting lab instructor in the College's accounting department.1/ She was interviewed by

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1/ The accounting lab is a room equipped with materials and staffed with personnel to provide assistance to accounting majors. It is open for the use of all accounting students, but is primarily patronized by those in the basic level accounting courses. According to the head of the accounting department, "[t]he major function of the laboratory instructor is to

Herbert Burns, the head of the department, who at the time gave no indication that Lewis was not qualified for the job, but did ask whether she would audit several accounting courses as a refresher so that she would be able to handle the job. Although Burns was responsible for reviewing all applications and conducting interviews, the ultimate selection was to be made by his superiors.

Also interviewed for the position was Flora Roberts, a white student in the process of completing the College's two year accounting program. Roberts' records indicated that she had taken a number of courses particularly relevant

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(footnote 1, continued)

tutor students on a one-to-one basis in solving the problems given to them by their classroom instructors."

to the job of lab instructor. In addition to the basic courses in accounting principles and intermediate accounting, Roberts had studied advanced accounting, auditing, and income tax and cost accounting. She eventually was hired for the job.

Following Roberts' selection over Lewis and five other applicants, Lewis, who had heard from several school employees that she had been recommended for the job, contacted David Hunter, the director of personnel, to inquire as to why she had not been selected. She was informed that Roberts was hired because of her superior academic credentials.

In the fall of 1976, Lewis again sought a better position by applying for the job of Senior Accountant in the College's Business Department. Although the College maintained a written policy

to announce such openings in its employee newsletter first, the school's Controller inadvertently placed the initial advertisement in the local city newspaper. Consequently, by the time Lewis applied for the position, it had been filled.

Subsequently, Lewis filed this action seeking declaratory relief, injunctive relief and back pay for lost wages. The College answered denying discrimination and requesting a jury trial on all issues. The district court denied that request and, after a full non-jury trial, concluded that Lewis had not proven discrimination with respect to the 1976 Senior Accountant opening,[2]

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[2] Lewis has not appealed or cross-appealed to challenge this portion of the lower court's decision.

but that she had been discriminated against by not being hired for the accounting lab position.

On appeal, the College presents three issues for review: (1) whether the district court erred in its finding of racial discrimination; (2) whether the district court erred in refusing defendant's request for a jury trial; and (3) whether the court erred in the amount of attorney's fees awarded. As discussed below, our disposition on the first issue alleviates the need for extensive consideration of the remaining two issues.

II.

In McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973), the Supreme Court established the basic allocation of burdens and order of presentation of proof in cases alleging discriminatory

treatment.3/ First, the plaintiff has the burden of establishing a prima facie case of discrimination. Then the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for rejecting the plaintiff. The burden of proving discrimination, however, remains with the plaintiff and, therefore, if the employer presents legitimate reasons for plaintiff's

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3/ Although McDonnell Douglas was a Title VII case and the trial court here treated Lewis' claim concerning the lab instructor position under 42 U.S.C. § 1981, it has been held, and we think correctly, that the McDonnell Douglas criteria apply equally to cases arising under Title VII or § 1981. Hudson v. Int'l Bus. Mach. Corp., 620 F.2d 351, 354 (2d Cir.), cert. denied 449 U.S. 1066 (1980); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1281 (7th Cir. 1977); Sabol v. Snyder, 524 F.2d 1009, 1012 (10th Cir. 1975); and Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974). Cf. United States v. Chesterfield County School District, 484 F.2d 70, 73 (4th Cir. 1973).

rejection, it is the plaintiff's burden to prove that those reasons were actually a pretext for discrimination.

In order to establish a prima facie case, "[t]he plaintiff must prove by a preponderance of the evidence that she applied for the available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). In the case at bar, Lewis established that she wa a member of a racial minority and had applied for the position of accounting lab instructor. She presented evidence of her qualifications, which included her academic credentials discussed above, her experience in the College's business office and her ability to perform

certain accounting-related tasks in her present job as "DICER accounting specialist" 4/ at the school. Finally, she presented evidence which indicated that Herbert Burns had initially recommended her for the job, but later changed his recommendation to urge the selection of Flora Roberts. This last evidence took the form of testimony from other employees who claimed knowledge of Lewis being recommended and a memorandum from Burns to his superior recommmending Roberts which referred to a "previous recommendation."

The College countered, primarily through the testimony of Burns, who explained that Roberts was hired because of her stronger academic background.

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4/ Lewis was promoted to her present position subsequent to the initiation of this suit.

Although he did not recall making a prior recommendation for the plaintiff, Burns did testify that he did not consider Roberts initially because her sister worked at the college and he had been told that she could not be considered due to the school's "anti-nepotism" policy. As it turned out, that rule had recently been abolished and, therefore, Roberts was eligible for the job.

After considering all of the evidence, the district court found, inter alia: that Lewis was better qualified than Roberts for the position of lab instructor; that Burns initially recommended Lewis for the position of lab instructor, which recommendation was subsequently withdrawn or overruled; that no explanation was given why the recommendation was overruled; and that

the College's justification that Roberts had a better academic record was pretextual. Accordingly, the court concluded that Lewis had met her burden of proving discrimination and was, thus, entitled to back pay for the period from 1975 until the time she was eventually promoted in 1978.

The critical question in this case is whether, in fact, Lewis was better qualified than Roberts for the position of accounting lab instructor. In our opinion, the finding of the lower court that she was is clearly erroneous and, therefore, we must reverse.

The record in this case indicates that Roberts was much better qualified for the accounting lab instructor job. She was in the process of completing the College's two year accounting program

and had received the highest attainable grade in six of her eight accounting courses. As already noted, her curriculum included four advanced accounting courses as well as supporting courses in mathematics, business and economics. Finally, although she did not have extensive practical experience, Roberts had already worked in the accounting lab on a part-time basis as the night lab instructor.

Lewis, on the other hand, had received a four year degree in economics, but had taken only four accounting courses and had no academic training since 1964. She had not studied any advanced accounting in college and overall her grades were poor. 5/ Additionally, during her

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5/ The record indicates that Lewis was on academic probation for poor scholarship during her last semester in college.

interview for the job, Herbert Burns indicated that it would probably be necessary for her to audit several courses as a refresher so that she "would be able to perform the job." 6/

Through direct examination, Lewis testified that in her present position she is exposed to a wide variety of accounting-related tasks. On cross-examination, however, she admitted that in her prior position as a cashier, the job she held when she sought the position of lab instructor, her duties included very little work involving journal entries and no work with the general ledger. Moreover, through a

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6/ Several years later, Lewis did, in fact, enroll in the College's basic accounting course as a refresher. On cross examination, she admitted that she opted for this course over a more advanced one because she had been out of school for such a long time.

series of questions posed at her deposition, the College established that Lewis did not even understand the basic concept of double-entry accounting. Consequently, although the plaintiff had some practical experience relevant to the position of lab instructor, it was hardly enough to overcome the deficiencies in her academic record. Therefore, in our opinion, the district court's finding that Lewis was better qualified for the position than Roberts is clearly erroneous.

Proof that the successful applicant was better qualified for the job is not, in and of itself, always sufficient to defeat a claim of racial discrimination. In this case, however, once the College established that Roberts was, in fact, far more qualified than Lewis, there simply was not enough other evidence to

support a finding of discriminatory intent. Indeed, the only other evidence which strongly implied possible discriminatory intent, the changed recommendation, loses its strength once it is determined that Roberts was better qualified. The trial court emphasized the fact tha apparently Burns initially recommended Lewis and then changed that recommendation to urge Robert's hiring. Burns explained, however, that although Roberts was the one he wanted for the job, there initially appeared to be a problem on the part of the college as to whether she was eligible to be hired. If Lewis had been better qualified, then this changed recommendation would certainly cast suspicion on the school's actual motive. However, since Roberts was clearly the best qualified, any

possible inference of discriminatory intent disappears.

In sum, the critical finding supporting the district court's determination of racial discrimination was that Lewis was better qualified than the successful applicant. Since we believe that the court erred in that finding of fact, we hold that the court also erred in concluding that the defendant's selection of Roberts was racially motivated. Accordingly, we reverse.

III.

As we reverse the lower court's decision on the merits of Lewis' discrimination claim, there is no need for us to reach defendant's contention that it was entitled to a jury trial in this case. Additionally, as a result of our disposition of the primary issue

before us, plaintiff can no longer be deemed the "prevailing party" in this action, see Bagby v. Beal, 606 F.2d 411, 415 (3rd Cir. 1979), and, thus, is not entitled to attorney's fees under 42 U.S.C. § 1988. Accordingly the district court's order requiring the College to reimburse Lewis $9,964.64 for attorney's fees and costs is also reversed.

IV.

For the foregoing reasons, that portion of the district court order finding for the plaintiff on the merits and awarding her back pay, and the accompanying order granting attorney's fees and costs are hereby reversed.

REVERSED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1079

Lillian R. Lewis, Appellee,

versus

Central Piedmont Community College, Appellant.

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O R D E R

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Upon consideration of the petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Russell and Judge Widener.

For the Court,

/s/ William K. Slate, II

CLERK

FILED
October 28, 1982
U.S. Court of Appeals
Fourth Circuit